Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

MICHAEL OATMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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The Question Presented for Review

May an acquitted defendant, seeking under the Hyde Amendment to recover his legal expense in defending against the criminal charge, proceed under § (b) rather than § (d) of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412?

Opinions Below

The opinion of the court below is Appendix A. *United States v. Oatman*, No. 99-2301, 2000WL 1888588 (6th Cir (Mich.), Dec. 19, 2000). The initial opinion of the District Court is Appendix B. The opinion denying reconsideration is Appendix C. None are reported.

Jurisdiction

The judgment of the court below was entered December 19, 2000. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254.

Applicable Statutory Provisions

The Act of November 26, 1997, Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519, commonly referred to as the Hyde Amendment, is uncodified, but appears as a note to 18 U.S.C. § 3006A. It is reproduced in Appendix D. The EAJA, 28 U.S.C. § 2412 is reproduced in Appendix E.

Statement of the Case

Petitioner, represented by retained counsel, was acquitted by a jury of a charge of assaulting a Federal Postal Service Police Officer. On March 19, 1999, the district judge entered a judgment of acquittal. Relying upon the Hyde Amendment, on June 19, 1999, petitioner filed a motion to recover, from the United States, his attorney fees and costs.

Initially, the district judge denied the motion on the merits, relying solely upon the record made at the jury trial (App. B). Petitioner moved for reconsideration, asking for discovery of internal documents relating to the decision to prosecute. Upon reconsideration, the district judge reaffirmed his denial of relief, but for a different reason:

> The court has examined this matter thoroughly and has concluded that the motion is time-barred [by the 30 day limit set in 28 U.S.C. § 2412(d)(1)(B)]. Thus, regardless of the merits, the court must reaffirm its denial of defendant's motion for attorney fees.

The Sixth Circuit affirmed.

Reasons for Granting the Writ

Three years ago, Congress enacted the Hyde Amendment authorizing EAJA-type relief for the first time to defendants in criminal cases. This petition tenders an important issue under the Hyde Amendment upon which the circuits are divided and this Court has yet to speak.[1]

The Sixth Circuit followed its own decision, *United States v. Ranger Elec. Communications*, 210 F.3d 627, 633 (6th Cir. 2000), holding that Hyde Amendment applicants could not seek relief under § 2412(b).

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[1]This Court has decided procedural issues under the EAJA in several cases in the past two decades, e.g., *Shalala v. Schaefer*, 509 U.S. 292 (1993) (timeliness of an application for EAJA costs in a social security setting); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991) (final judgment *vis-à-vis* final disposition in administrative proceedings in triggering 30 day clock of § 2412(d)(1)(B)).

> Section 2412(b) directs the applicant to look for an independent statute which gives a remedy of attorneys' fees and expenses independent of the EAJA. As the Hyde Amendment incorporates the EAJA, it would be circular to go back to the Hyde Amendment to treat it as an independent statute giving the right to attorneys' fees without the thirty-day limitation.

True, one should avoid circularity in reasoning (more properly called question begging). However, cross-referencing in statutes is a common and useful practice, hardly a circularity to be condemned. In its analysis, the Sixth Circuit overlooked the incompatibility of the Hyde Amendment with § 2412(d).

The Hyde Amendment expressly contemplates an evidentiary hearing to consider material not in the record.

> To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence *ex parte* and *in camera* . . . .

In contrast, § 2412(d)(1)(B) forbids an evidentiary hearing:

> "[The application for fees] **shall be determined** on the basis of the record . . . which is made in the civil action for which fees and other expenses are sought."

In a criminal case, the prosecutor's control of the record is often almost total, especially when a Rule 29 judgment of acquittal is granted. Isn't that the most likely kind of case that

would generate a Hyde Amendment application--one where the government's evidence is insufficient to take the case to the jury? If the Hyde Amendment applicant were limited to the trial record, as § 2412(d) requires, then references in the Hyde Amendment to *in camera* inspections and sealed records would be meaningless. If Hyde Amendment applications were required to be placed in the straitjacket of § 2412(d) procedure, then the amendment would be but an empty promise.

Perhaps a hypothetical would put the issue in focus. The incident that formed the basis of petitioner's prosecution was also the basis for his discharge from the postal service where he had thirteen years seniority. An arbitration award overturned the discharge eighteen months later and petitioner was ordered restored to his job. Less than a month later, he was indicted. This much is in the record of this case.

Suppose that in pretrial plea negotiations the prosecutor had proposed to dismiss the indictment or offer other leniency conditioned upon the petitioner abandoning the benefit of the arbitration award and resigning from his job. This conduct would be criminal extortion in Michigan and almost every other jurisdiction. *People v. Percin*, 330 Mich. 94; 47 N.W.2d 29 (1951). But how could petitioner demonstrate such "vexatious" conduct without an evidentiary hearing?

The Sixth Circuit acknowledged that its decision was contrary to *United States v. Holland,* 34 F. Supp.2d 346, 358-359, *aff'd on other grounds*, 214 F.3d 523 (4th Cir. 2000).

> . . . Hyde Amendment applicants in criminal cases may make the same election as civil litigants may make in claims under the EAJA and, accordingly, the Hollands may proceed

> under section 2412(b) free of section 2412(d) limitations.
>
> Section 2412(b) applies in situations where "the common law or a statute specifically provides for such an award," and the Hyde Amendment meets the description of such a statute.

The Fourth Circuit rule that the applicant can elect to proceed under either § 2412(b) or § 2412(d) is more in line with decisions in other circuits. For example, in *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216 (U.S.App.D.C. 1991), the parties prevailing in that civil litigation could not qualify for EAJA relief under § 2412(d). They were too wealthy! They solved the problem by electing to proceed under § 2412(b). That court held that such an election was available to them under EAJA.

Conclusion

This petition presents a single issue of law unencumbered by any factual issues. It is an issue important to our jurisprudence and which this Court has not yet addressed.[2] A clear and explicit conflict in the circuits exists. It would be ironic indeed if access to the Equal Access to Justice Act would vary from circuit to circuit.

Respectfully submitted,

Philip A. Gillis
Counsel of Record

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[2]This Court has yet to speak on any issue involving § 2412(b), as far as we can determine.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 19, 2000]

No. 99-2301

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
MICHAEL OATMAN, *Defendant-Appellant*.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: DAUGHTREY and MOORE, Circuit Judges, and CARR, District Judge.

PER CURIAM. Approximately three months after his acquittal on charges of assaulting a federal officer, Michael Oatman sought attorneys' fees and costs from the United States pursuant to the provisions of the Hyde Amendment. Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, Historical and

Statutory Notes). The Hyde Amendment, passed by Congress in 1997, enables a prevailing criminal defendant to seek such recompense upon a showing that the position of the United States was "vexatious, frivolous, or in bad faith." The Hyde Amendment also directs that such awards be granted pursuant to the procedures and limitations provided for an award under the Equal Access to Justice Act in 28 U.S.C. § 2412.

Unfortunately, § 2412 envisions two separate procedural mechanisms for claiming costs and fees from the government. Subsection (b) of the statutory provision contains no expressed time limitation for filing a request for the compensation. Section 2412 (d)(1)(B), by contrast, unambiguously provides that a party seeking an award of attorneys' fees and costs under the act must submit an application for the payment within 30 days of the final judgment in the action.

In this appeal, Oatman insists that his application for fees and costs under the Hyde Amendment is being made pursuant to the provisions of subsection (b) of § 2412. Consequently, Oatman contends that his request is not governed by the 30-day time limitation discussed in subsection (d).

We addressed this exact issue in our recent decision in *United States v. Ranger Electronic Communications, Inc.*, 210 F.3d 627 (6th Cir. 2000). In that opinion, we determined that a request for attorneys' fees and costs under the Hyde Amendment is indeed governed by the provisions of § 2412 (d), including the 30-day filing limitation. Because defendant Oatman's application in this case was made long after the expiration of the applicable 30-day period, the law of this

circuit compels us to conclude that the request was untimely and that this court lacks jurisdiction over the sole issue raised on appeal. As a result, we now AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed July 14, 1999]

Criminal Action No. 98-CR-80774-DT

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL OATMAN,
Defendant.

HON. BERNARD A. FRIEDMAN

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY FEES

On July 7, 1999, this matter came before the court on defendant's motion for attorney fees. A hearing was held and oral argument heard. For reasons stated on the record,

IT IS ORDERED that defendant's motion for attorney fees is denied.

s/_____
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: July 14, 1999
Detroit, MI

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 27, 1999]

Criminal Action No. 98-CR-80774-DT

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL OATMAN,
Defendant.

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

This matter is presently before the court on defendant's motion for reconsideration of the court's order denying his motion for attorney fees. Plaintiff has filed a response. Pursuant to E.D.Mich. LR 7.1(e)(2) and 7.1(g)(2), the court shall decide this motion without oral argument. Accordingly, the hearing scheduled for October 27, 1999, is canceled.

In this case, the grand jury indicted defendant on a single count of assaulting a federal officer, in violation of 18 U.S.C. § 111. After a two-day jury trial in March 1999, defendant was acquitted. The court entered a judgment of acquittal on March 22, 1999.

On June 18, 1999, defendant filed a motion for attorney fees pursuant to the Hyde Amendment of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1998, Pub.L.No. 105-119, 111 Stat. 2440, 2519. Plaintiff opposed the motion on the grounds that it was filed beyond the 30-day statutory deadline. In reply, defendant argued that the filing deadline is unclear and that the court should decide the motion on the merits. Following a hearing on July 7, 1999, the court denied defendant's motion on the merits, without ruling on the timeliness issue.

In his motion for reconsideration, defendant asks the court to reexamine the merits. In response, plaintiff repeats its argument that the motion should be denied as untimely. In addition, plaintiff asks that the court stand by its earlier ruling on the merits.

The court has examined this matter thoroughly and has concluded that the motion is time-barred. Thus, regardless of the merits, the court must reaffirm its denial of defendant's motion for attorney fees.

The Hyde Amendment states:

> . . . in any criminal case . . .[the court] may award a reasonable attorney's fees and other

> litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code.

Pub.L. 105-119, 111 Stat. 2440, 2519. In turn, 28 U.S.C. § 2412, the Equal Access to Justice Act (EAJA), states:

> (d)(1)(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection . . . .

(Emphasis added.) The EAJA defines the term "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G).

Compliance with the 30-day filing requirment of § 2421 [sic](d)(2)(G) is jurisdictional. In *Allen v. Secretary of Health and Human Servs.*, 781 F.2d 92, 94 (6th Cir. 1986), the Sixth Circuit stated:

> We agree with the following language of the District of Columbia Circuit Court:

> The thirty-day time limitation contained in EAJA is not simply a statute of limitations. It is a jurisdictional prerequisite to government liability. ASH's failure to file in timely fashion deprives this court of subject matter jurisdiction to award fees.
>
> The Equal Access to Justice Act significantly abridged the government's immunity from suits for attorneys' fees. As a waiver of sovereign immunity, the Act must be strictly construed. Once the government agrees to allow such suits, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit." Courts have consistently held that a statutory time limitation is an integral condition of the sovereign's consent. Compliance with that condition is a prerequisite to jurisdiction.

Action on Smoking and Health v. C.A.B., 724 F.2d 211, 225 (D.C. Cir. 1984) (footnotes omitted).

See also Peters v. Secretary of Health and Human Servs., 934 F.2d 693, 694-95 (6th Cir. 1991) (noting that the 30-day filing

requirement is "jurisdictional" and dismissing an untimely motion for attorney fees for lack of jurisdiction); Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990)("This requirement is jurisdictional in nature . . .; thus, a claimant's failure to file an EAJA application within this time constraint precludes a district court from considering the merits of the fees application"); United States v. Ranger Elec. Communications, Inc., 22 F. Supp. 2d 667, 674 (W.D. Mich. 1998) ("This jurisdictional limitation is especially fatal to claims for attorney fees in criminal actions because the EAJA waiver of sovereign immunity as to other fee statutes and under the common law applies only to civil and not criminal actions).

In the present case, defendant's motion for attorney fees was filed long after the 30-day deadline. The judgment of acquittal was entered on March 22, 1999. The thirtieth day thereafter was April 21, 1999. Defendant did not file his motion for attorney fees until June 18, 1999. The motion was untimely and, under the authority indicated above, the court lacks jurisdiction to entertain it. Accordingly,

IT IS ORDERED that defendant's motion for reconsideration is denied.

Dated: October 27, 1999
Detroit, Michigan

s/_____
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

HYDE AMENDMENT

Award of attorney's fee and other expenses where position of United States is vexatious, frivolous, or in bad faith. Act Nov. 26, 1997, P.L. 105-119, Title VI, §617, 111 Stat. 2519, provides: "During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision." (reprinted in 18 U.S.C. § 3006A, Historical and Statutory Notes.)

APPENDIX E

US Code, Title 28, Sec. 2412. Costs and Fees

(a)

(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the

terms of any statute which specifically provides for such an award.

(c)

(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)

(1)

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the

court finds that the position of the United sates was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an

adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (the amount of fees awarded under this subsection shall be based upon prevailing market rates of the kind and quality of the services furnished, except that

(i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour

unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justified a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 USC 501 (c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 USC 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure

to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when

accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provision of this section shall not apply to any costs, fees and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (1) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section

1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.